IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 25, 2009 Session

STATE OF TENNESSEE v. BOBBY KILLION AND STEPHEN EWING

Appeal from the Criminal Court for Hamblen County
No. 07-CR-449 John Dugger, Judge

No. E2008-01350-CCA-R3-CD - Filed June 22, 2009

A Hamblen County Criminal Court jury convicted the defendants, Bobby Killion and Stephen Ewing, of one count each of dog fighting, a Class E felony, *see* T.C.A. § 39-14-203 (2006), and assessed a $2,800 fine against each defendant. The Hamblen County Criminal Court sentenced each defendant as a Range I, standard offender to two years' incarceration in the county jail and ordered a fine of $2,000. The defendants appeal, arguing that the trial court erred by denying their motions to suppress evidence found in Mr. Ewing's basement because the discovery of the evidence occurred during an illegal search. The defendants maintain that Mr. Ewing's consent to search his basement, which was the result of an illegal seizure and duress, was not voluntarily given. The defendants further argue that the convicting evidence was legally insufficient and that their two-year sentences were excessive. Mr. Killion individually challenges the trial court's finding during the suppression hearing that a 9-1-1 call implicated dog fighting, and he argues that the cumulative effect of the State's characterization of the evidence entitled him to a new trial. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Agnes Sipple Trujillo, Bean Station, Tennessee, for the appellant, Bobby Killion.

D. Clifton Barnes, Assistant Public Defender, for the appellant, Stephen Ewing.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; C. Berkely Bell, District Attorney General; and Kim Morrison, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Introduction

On May 28, 2007, officers of the Morristown-Hamblen County Humane Society ("Humane Society") received an anonymous call reporting dog fighting at Mr. Ewing's residence. After meeting with city police officers at the sheriff's department, the Humane Society officers and city police officers arrived at Mr. Ewing's residence. The officers heard dogs barking, and one officer spoke with an unidentified female at the front door of the home while another officer used an "alley" to approach the back yard, where a group of individuals and two dogs were present. The officer drew his gun and pointed it at one of the dogs, which the officer believed was untethered at the time, and asked that the dog be secured. Mr. Ewing, who was holding the pit bulldog at the time of the officer's arrival, complied. Upon noticing a "blacked out" window in the basement of the home, a second officer asked Mr. Ewing to open the basement door. In the basement, the officers found Mr. Killion, two pit bulldogs, and various articles they associated with dog fighting.

On September 24, 2007, a Hamblen County grand jury indicted the defendants for dog fighting, alleging that on May 28, 2007, the men "knowingly aid[ed] or abett[ed] dogs to fight each other for amusement, sport or gain." Both defendants moved to suppress the evidence found in the basement of Mr. Ewing's residence at 319 West Seventh North Street in Morristown. After a hearing, the trial court denied the motions, and on March 5, 2008, a jury convicted the defendants as charged after a joint trial. After a joint sentencing hearing, the trial court entered the judgments of conviction on March 20, 2008, and each defendant filed a timely motion for new trial. The trial court denied the motions for new trial, and both defendants filed timely notices of appeal. On September 16, 2008, this court consolidated the cases for purposes of appeal pursuant to Tennessee Rule of Appellate Procedure 16(b).

Motion to Suppress

Both defendants moved to suppress evidence found in Mr. Ewing's basement, claiming the discovery of the evidence resulted from an illegal search. Mr. Ewing asserted that he had a legitimate expectation of privacy in his back yard. He argued that no probable cause existed for the officers' entrance into his backyard and that his consent to search the basement was involuntary. Mr. Killion, claiming that he enjoyed an expectation of privacy as an overnight guest in Mr. Ewing's residence, made the same arguments.

At the March 3, 2008 motion hearing, Humane Society Officer Chris Collins testified that on May 28, 2007, he received a call regarding Mr. Ewing's residence, and in response to the call, he met with city police officers at the sheriff's department and then went to the location. Officer Collins drove his "animal control truck," the city officers drove their police cruisers, and Humane Society Officer Richard Hart drove his personal vehicle. Officer Collins stated that he did not carry a firearm on this call. The officers parked the vehicles on the street in front of Mr. Ewing's house, and Officer Collins and Officer Hart stood in the middle of the street and "look[ed] around, listening." Officer Collins stated that he heard dogs barking and that he observed "[a] female running to the back part of the house from the front door [and] coming back to the front door." He testified that the woman at the front door asked him what the officers were doing and that he explained to her that he "had a call about a dog fight going on." During this time, one of the city officers went around the street to the back part of the house and observed several individuals standing outside, and Officer Hart approached the back yard from the side of the house. Officer

Collins identified a photograph depicting the city officers' view of the Ewing back yard from the parking lot of an apartment building behind the home.

At that point, Officer Collins heard Officer Hart say, "Restrain your dog," and Officer Collins went to the back yard of the home where he saw a man holding a pit bulldog by its collar. He explained that Officer Hart had drawn his weapon but that he pointed the gun at the pit bulldog and not the man, who was later identified as Mr. Ewing. Officer Collins then saw Mr. Ewing's "taking the dog and putting it back on a chain, and [Officer] Hart['s] putting his gun back into his holster." Officer Collins testified that he, Officer Hart, and the city officers questioned everyone in the back yard for "[m]aybe five minutes." He observed two pit bulldogs in the back yard as well as two trucks and two cars. Officer Collins also noticed a door to a basement and a window that had been "painted out." At that point, "Mr. Ewing, offered this was his property, and I asked him if they [sic] was anything in the basement, and he said no." Officer Collins explained that he wanted to see the basement because of "[t]he suspicion of the window being painted out." Officer Collins testified that Mr. Ewing "freely opened the door himself," and in the basement "there was a blue kennel with a pit bull chewed up sitting there in plain view." Officer Collins maintained that the encounter with Mr. Ewing was "[j]ust a general conversation" and that "[t]here was no force."

On cross-examination, Officer Collins admitted he did not learn the name of the female at the front door and that he took no statement from her. He further stated that the city officers who drove behind the house observed the back yard from a private parking lot rather than a public street. He remembered Officer Hart's saying, "Restrain your dog or I'll put it down." Officer Collins also recalled that the pit bulldogs in the back yard were not injured although they had old scarring. He explained that seeing the dog in the basement was "a sign of cruelty and neglect," so the officers "h[ad] the authority to go in." He said, "Under T.C.A. code, prevention of cruelty to animals, if we see an animal injured we don't have to have a search warrant."

Officer Collins agreed that "everyone came across private property to get to Mr. Ewing's property." He also admitted that, apart from the anonymous phone call reporting dog fighting, nothing else at the property indicated illegal activity. He agreed that the people in the back yard appeared to be 18 to 20 years old, including Darius Ewing, Mr. Ewing's son. He also agreed that he "asked to get into the basement because of speculation."

Officer Hart testified that he received a call from Officer Collins on May 28, 2007, to meet him at the sheriff's department and that he then proceeded to Mr. Ewing's home. He wore street clothing, carried a firearm on his hip, and drove his personal vehicle. Upon arriving at the residence, he stood with Officer Collins in the street listening for "[s]ounds of dogs." Officer Hart testified that he "couldn't see anything from the front of the residence or of any residence right there." He explained that it was dusk and that "[t]here were no lights like a . . . backyard light or anything like that." He testified that they "[e]ventually" heard dogs barking. Officer Hart observed a female and a child standing at the doorway of that residence. He said, "The female . . . left abruptly, went to the back . . . . She reappeared, came outside, made the comment about what's going on, where Officer Collins proceeded to speak to her." At that time, the city officers told Officers Hart and Collins that they were "going to go around" because the barking appeared to come from behind the residence.

The city officers, who had observed the back of Mr. Ewing's residence, radioed Officer Hart, and he then proceeded to the left of the residence, using the alley between the residence and another house to approach the back yard. He testified that he observed five or six individuals in the yard and that he saw Mr. Ewing holding a pit bulldog by the collar. Although the dog "wasn't doing anything at the time," Officer Hart drew his weapon, pointed it at the dog, and told Mr. Ewing, "Secure your dog or I'll drop it where it stands." He testified he holstered his firearm immediately after Mr. Ewing secured the dog. At that point, the city officers approached the yard from the side, and Officer Collins approached from behind him. Officer Hart testified, "Basically, general questions were asked, What's going on, What are you doing? Answers were, Nothing, just having a get-together." He observed another pit bulldog, secured by a chain, on the opposite side of the lawn. Officer Hart testified that he observed a door, which presumably led to the basement of the residence, and a window that had been "blacked out" with red paint. He stated that Officer Collins then asked Mr. Ewing to open the door and that no officer had his weapon drawn at that time.

Officer Hart stated that Mr. Ewing "freely opened the door" and that he observed another pit bulldog inside a blue carrier "with obvious injuries to the dog" and "a lot of blood." After entering the basement, Officer Hart observed "Mr. Killion stand up or crouching over," so he "re-drew [his] weapon, [and] told Mr. Killion . . . , ['']Let me see your hands.['']" Officer Hart testified that Mr. Killion then showed his hands and backed out of the basement.

Officer Hart observed "a lot of trash, a lot of the same stuff you would observe in anybody's . . . unfinished basement." He described an old mattress covered with "a lot of dirty sheets" and "tubing and things like that." He did not observe a restroom in the basement or anything suggesting that Mr. Killion slept in the basement.

On cross-examination, Officer Hart stated that he "hope[d]" that he surprised the group of people in the back yard when he entered the yard with his firearm drawn. When asked what authorized him to enter the back yard, he stated he had the authority to investigate any anonymous tip. He explained that he went through the alley to the back yard because the barking dogs may have been associated with criminal activity. Defense counsel asked, "So if the dogs are barking at a private residence you have the right to go on that property?" Officer Hart responded, "If I am asked to investigate a crime, yes." Officer Hart maintained that he did not get a warrant before entering the property because "that could be the difference between evidence and no evidence," and "a lot of times in dog fighting . . . evidence can disappear real quick."

Mr. Ewing testified that on May 28, 2007, he held a "going-away party" at his residence for his son, who was about to leave for college, which was attended by friends of his son. He testified that his dogs were not barking and that even "[i]f they were, they couldn't hear it for the music the kids were playing." He stated that his neighbors also had barking dogs.

Mr. Ewing stated that he was in his back yard "knelt down untangling [his] dog" when Officer Hart "walked around the corner of the house." He said that the alleyway used by Officer Hart was the private property of his next-door neighbor. Mr. Ewing explained, "The collar was not off the dog and I heard him say, Nobody move." He testified that Officer Hart had his firearm drawn and that he said, "Secure your dog," even though "[t]he dog was already secured."

He testified that he did not know that Officer Hart was a law enforcement officer at the time; however, on cross-examination he stated that he did observe the city officers in the parking lot of an apartment complex that he could see from his back yard. Mr. Ewing remembered Officer Hart's having his weapon displayed for "[a] couple of minutes" and that the officer "still had the gun by his side" when he inspected the pit bulldog. The dog that Officer Hart inspected belonged to Mr. Ewing and was not injured. Mr. Ewing stated that Officer Hart then said, "Everything seems fine here," and walked across the yard to the other dog with his gun in hand. Mr. Ewing testified that other officers arrived at the yard and that they had to cross two private yards to get to his.

Mr. Ewing testified that he heard Officer Collins say, "Let's have a look in the basement," before he asked Mr. Ewing, "[D]o you mind if we look in the basement?" Mr. Ewing responded, "No, sir." Mr. Ewing testified that he did not feel as if he could refuse the officers "because they had a gun drawn." He stated that he felt "threatened" and "intimidated." Mr. Ewing insisted that Officer Hart still had his gun drawn as they walked to the basement door. He said that Officer Hart "walked in and saw [Mr. Killion] and he said, Back out, and he pointed the gun at [Mr. Killion] and he said, Don't you move."

Mr. Ewing testified that Mr. Killion was his friend and that Mr. Killion had stayed in the Ewing basement the night before May 28, 2007. He explained that Mr. Killion had been "kicked out" of his house by his wife and needed a place to stay. He said that Mr. Killion "had brought some stuff in like the week before this evening and was getting situated."

At the close of proof in the suppression hearing, the trial court made detailed factual findings on the record,

> That on May 28th, 2007, . . . Officer Chris Collins of the Morristown-Hamblen Humane Society received a call that there was a dog fighting occurring at a residence on West Seventh North Street. The officer contacted Officer Hart, who was in his personal vehicle; Officer Collins was in the Humane Society vehicle; and they contacted two city police officers, Morristown City Police Officers, Officer Young and Officer Zion. They all arrived and met here at the Hamblen County Justice Center where they went to West Seventh North Street. Officers Young and Zion proceeded off of West Seventh North Street to a dead end area behind some apartments. From behind those apartments area they could view and see the backyard of 319 West Seventh North Street and could see individuals in the back and dogs in the back. Officer Collins was at the front of the residence, observed a female come to the door of the residence with a child, and that the female ran towards the back of the residence for a moment and then came back to the front door. At that point, Officer Hart proceeded around on property adjacent, beside Mr. Ewing's property at 319 West Seventh North Street, and proceeded around to the back where he observed numerous people, dogs, and he heard dogs, that he stated, before he went back there. And that he

> observed Mr. Ewing holding a dog by the collar. Mr. Ewing testified that he was untangling a dog at the time, that the dog was secure. But, and then the Court finds that Officer Hart pulled his handgun and pointed it at the dog and told Mr. Ewing to restrain the dog or he would drop the dog.

The trial court also found that a photograph in evidence showed the area where the city officers were standing to observe the back yard, and it found that the officers could observe "the dogs, the defendant, Ewing along with other individuals, and also the backdoor area and a window that has been [painted red]." The court continued,

> The Court further finds that upon Mr. Ewing restraining the dog that officers looked and . . . had seen old scars on the dog and did not observe any other activity which would [lead them to] believe that a dog fight was taking place at the time because there were no injuries to the dogs.
>
> Officer Collins observed a backdoor area and also paint on a window to this basement, and Officer Collins asked Mr. Ewing, Is there anything going on in the basement? And Mr. Collins asked if they could look in the basement. And Mr. Ewing said, I said, no sir, and that is -- if he had any problem for him to look in the basement, and Mr. Ewing in his statement said, I said, no, sir, that there was no problem. And he had no problem for them to look in the basement, which the Court finds that Mr. Ewing gave consent.

The trial court addressed whether consent was voluntarily given and whether Mr. Ewing "was under some kind of duress because earlier a pistol had been pointed at his dog." The trial court found that Officer Hart no longer displayed his weapon at the time when Mr. Ewing gave his consent to Officer Collins. The court found that "the consent was voluntarily given by Mr. Ewing, that there was no duress at that time." It further found, "[T]he consent was unequivocal, specific, and intelligently given. [Officer Collins] said, Do you have a problem if we look in the basement? And [Mr. Ewing] said, No, sir, and he opened the door." The court then found,

> At that time officers observed a dog, which had been injured. . . . [T]he dog has had blood on it and had apparently been involved in some kind of fighting. There's, also, appears to be dried blood on the crate, on the left side of the crate, and there is some blood droplets on the cage of the crate.
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> As far as Mr. Killion, the Court finds that Mr. Killion, by the testimony . . . was staying in that bed in the basement and had slept there the night before and this night. So the Court thinks that he would have standing because he is sleeping there, he would have some expectation of privacy down in the basement where he's

> sleeping. So the Court feels that he has some expectation of privacy, but that Mr. Ewing is the owner of the residence and gave consent, and it was voluntarily, unequivocally given and he was not under duress from Mr. Collins in any way when that consent was given.

The trial court denied the motions to suppress on these grounds.

Trial Evidence

Officer Blake Zion of the Morristown City Police Department testified that he received a call on May 28, 2007, to meet the "Humane Services guys" at the sheriff's department. After meeting at the sheriff's department, he traveled to Mr. Ewing's residence. He testified that upon arriving at the residence, he saw Officer Collins walking to the front door. Officer Zion saw someone come to the front door and what appeared to be someone "running through the house." Officer Zion testified that his "initial response" at seeing this "was we got somebody possibly getting ready to bolt . . . out the back door," so Officer Zion drove around behind the house.

He and another city officer drove around an alleyway where he observed a group of males in the back yard near the house. He saw two or three vehicles and two dogs on chains. Officer Zion used his radio to inform the other officers of what he observed in the back yard, and then "other units started coming around." The officers "started interacting with" the people in the back yard to determine the situation. At that point Officer Zion's only goal was to secure the scene, and the Humane Society officers continued the investigation.

On cross-examination, Officer Zion agreed that he observed "[j]ust a bunch of people hanging out in the backyard" and that he did not observe anything illegal.

Officer Hart provided essentially the same testimony as he did in the suppression hearing. He stated that he first arrived at the Ewing residence at approximately 8:15 or 8:30 p.m. and that the law enforcement officers ultimately left the scene at approximately 3:00 a.m. In addition, he described Mr. Ewing's house as a split-level home, with the front door at street level and the basement dug into a hill below. He further testified that, upon entering the basement, he saw a structure composed of boards and approximately three or four feet tall "forming a square area" against the basement's cinder-block walls. He also observed a green spray can, which "could be used to spray walls, to clean up, to keep dust down in the pit because most dog fighting pits are dirt flooring." Upon viewing a picture of the structure in the basement, he said,

> This picture is consistent with my training as to what a dog fighting pit would look like. Inside the pit, as you can see, this is the [spray] canister that I observed. Also, there are markings on the walls and the blacked-out window as we observed from the outside of the building. Of course, one lighted area directly above the area, here, and the dirt flooring.

Officer Hart testified that he also observed in this area of the basement another pit bulldog in a transport carrier, which dog was covered with mud and had "obvious injuries." He also observed a digital clock on a window ledge and a "break stick" or "pry stick" that appeared to have blood on it in the area. He explained, "Basically, [a break stick] is a wooden device . . . used -- when dogs are fighting their jaws lock, and this stick is used to pry them apart, to break the bite." Officer Hart said, "I observed red drippings running down the walls in spotted area. Also kind of like splatter type markings. Also markings that look like something was sprayed onto the walls." Officer Hart testified that, after observing the scene, the law enforcement officers transported the dogs to the Humane Society where they were examined by a veterinarian the next day.

Officer Hart explained that the basement was unfurnished and had dirt flooring with mud in some areas. He agreed that the basement had a low ceiling in some areas; however, he stated that he was able to fully stand in the enclosed area. He explained that the enclosed area was cleared out except for the sprayer, the "break stick," and the kennel containing the second dog. The other areas of the basement were not cleared out and had "a lot of junk everywhere."

On cross-examination, Officer Hart acknowledged that when he entered the back yard with his firearm drawn, Mr. Ewing was "in pretty close proximity to the dog" at which he pointed his handgun. He explained that he carried a Sig Sauer forty caliber handgun, which he described as a large firearm. He admitted that, at the time he arrived at the scene, he did not observe any dog fighting.

Officer Hart stated that pit bulldogs are generally "docile" and can serve as "family dog[s]" but that he had encountered some that were unfriendly toward humans. He also agreed that pit bulldog females are generally smaller than males; however, he stated that either gender could be used for dog fighting "[d]epending on what level of animal fighting that you're involved in." He explained that generally two dogs fight until one dies, becomes seriously incapacitated, or "gives up," and he noted that pit bulldogs are known for refusing to "give up" in a fight. He stated that he and the other law enforcement officers at the scene were concerned for the second dog found in the basement because it was cut and bleeding.

Officer Hart acknowledged the short length of the alleged "break stick," but he responded that the length was consistent with "street level" equipment. He also agreed that dog fighting pits generally have space for spectators. He admitted that he never collected and tested any of the "red liquid" from the scene to determine whether it was blood, and he agreed that the sprayer could have been used by a typical dog owner or home owner. Officer Hart described other findings in the basement, including the mattress described in the suppression hearing and "a bucket with some bloody water in it and a rag and a bunch of trash." Officer Hart maintained, "There was no evidence [in the basement] that [Mr. Killion] was trying to clean up the dog or render assistance to that dog."

Officer Collins also gave trial testimony substantially identical to that given at the suppression hearing. He explained that through his training on "blood sports" and his experience, he knew "the things that you look for when you go into a place, the objects that are used, the type of different animals that are used in fighting." He explained that, upon Mr. Ewing's opening the basement door, he observed a pit bull in a carrier "covered in blood." He observed that the dog's

face, nose, and leg were "chewed up." After Officer Hart entered the basement, he advised Officer Collins of "soon-to-be a fighting dog pit sitting there." Officer Collins testified that he then entered the basement and observed the second injured dog in the kennel. The two dogs found in the basement were females and the two dogs found in back yard and discussed in the suppression hearing were males.

Officer Collins testified that the floor of the basement was "kind of muddy" and that he found a handmade "break stick" and a timer above the window. He observed a blue wall around the enclosed area that had what "appear[ed] to be blood and spray marks of water." Officer Collins testified that he also observed the bucket of bloody water and a towel. After observing the basement, the law enforcement officers questioned the people at the Ewing residence, and he charged the defendants with animal fighting.

On cross-examination, Officer Collins admitted that he did not test the red liquid to determine if it was blood; however, he testified that he encountered blood at the Humane Society on a daily basis. Officer Collins also admitted that dogs kept domestically will fight on occasion absent provocation from people.

Doctor Daniel Parks, a veterinarian for Five Rivers Mobile Veterinary Services testified that he examined the two female pit bulldogs from the Ewing basement. He testified that the first dog had "multiple puncture wounds" on its face and "a big deal of swelling around the nose and even some additional smaller puncture wounds up over the eyes." Doctor Parks noted blood and drainage from wounds on the side of the dog's nose and ear. He also noted "a tear or a gash" in the first dog's leg. Doctor Parks explained that the "puncture wounds" were teeth marks, generally from fighting. He said, "Generally, these type wounds are treated with topical cleaning daily and antibiotics, as well as systemic antibiotics to keep down infection." He noted that the wounds were not severe enough to require sutures and that a dog owner should leave such wounds un-bandaged. Doctor Parks testified that the second dog had multiple puncture wounds around the shoulder, leg, neck, and front legs. He also noted tearing of the skin on the second dog's legs. He opined that these "fight wound/bite . . . wounds . . . [we]re caused by another animal" and that the medical attention required for the second dog would be the same as he described for the first dog.

On cross-examination, Doctor Parks agreed that the nature of the dogs' wounds did not require emergency assistance and that a responsible owner would clean the wounds at home, then take the dog to a veterinarian the following day. He said that the dogs were not "bleeding to death." Doctor Park stated that he would not knowingly treat a dog that had been used for pit fighting.

The State rested, and both defendants testified. Mr. Ewing testified that he did not hold a dog fight at his residence on May 28, 2007. He testified that he was watching television when Mr. Killion called at approximately 4:30 or 5:00 p.m. He explained, "[Mr. Killion] and his wife were going through a divorce. He had already been put out. He'd ask[ed] me about probably providing him a place to stay until he could find him a place to stay." Mr. Ewing explained that Mr. Killion owned two pit bulldogs that also needed to stay with him. He drove to Mr. Killion's home to load the dogs. He stated that the dogs were injured from fighting at the time he arrived at the Killion home and that Mr. Killion had already had them separated and placed in transport crates.

He explained, "[The dogs had] been in a pretty rough scuffle. They'd been fighting for a minute or two. They was cut up, scratched pretty bad, needed tending to." On cross-examination, he admitted that he never actually saw the dogs fighting.

Mr. Ewing testified that he, Mr. Killion, and the dogs returned to his home and that Mr. Killion planned to stay in his basement with the dogs. He said, "[Y]ou have to go around the back to get into the basement because there's not a stairway leading upstairs." He explained that his basement was unfinished and that the cleared area that was penned off with wooden walls "[was] not a pit." Mr. Ewing explained,

> It's a kennel. I raise [pit bull]dogs. I have for the three and a half years I've been there. I don't have a fenced-in yard. I don't have an outside kennel. I use that for raising my pups. It's a dirt floor. It's convenient. I have inside water. It is cool in the summertime and warm in the winter because of my heat pump.

Mr. Ewing explained that he had "got[ten] rid of [the] last one of the litter [he] had" about two weeks before May 28, 2007. He testified that another portion of the basement contained a bed and living facilities and that the remainder of the basement contained a "[w]hole bunch of stuff" he stored. He testified that the basement window was painted-over before he moved into the home. He also explained that the basement did not have a full-height ceiling. He said, "You can't walk straight. Every rafter you come to, you better duck or you're going to knock your head off."

Mr. Ewing testified that the two male pit bulldogs located outside the basement belonged to him. The dog that he was holding when Officer Hart approached the back yard was a "fifty-fifty house dog." He testified that he had very recently received the second dog. He said, "A gentleman had just brought him there that night, dropped him off, and was fixing to leave when the Humane Society drove up."

Much of Mr. Ewing's testimony about May 28, 2007, echoed that given during the suppression hearing. In addition, he maintained that he used the sprayer found in the basement to spray his dogs for fleas and ticks and to spray the basement for crickets and mosquitos. He stated that the "break stick" belonged to Mr. Killion, who brought it with him from his residence. Mr. Ewing explained that he provided the bucket of water and towel for Mr. Killion to clean his injured dogs. Mr. Ewing maintained that the mud and blood on the walls resulted from his "pups" fighting "over food, a place to sleep, bragging rights or whatever" and from having female pit bulldogs give birth in the basement. He testified that, on occasion, he had to muzzle female pit bulldogs to stop them from fighting with others. He also explained, "The purpose of that clock is to determine when females come in heat, date and times to breed them, and date and times to register when pups are born." He testified that he kept the clock on a stand by the bed and not on the window ledge.

Mr. Killion testified that, three days before he was arrested, his wife told him and his 17-year-old daughter, Alyssa, to move out of the house. He explained that the family kept four dogs, including two female pit bulldogs, "Tennessee" and "Little Bit," who were eventually discovered by law enforcement officers in Mr. Ewing's basement. He testified he had raised the dogs since they

were puppies and that they were regularly walked and "played with." Mr. Killion stated that, at first, his wife allowed him to leave the two pit bulldogs at the home while he and Alyssa found another place to live. He stayed that night with Mr. Ewing, whom he described as a "casual friend," and Alyssa stayed elsewhere.

Mr. Killion stated that the next day, he was with Alyssa in her car looking for apartments when he received a telephone call from his wife at approximately 4:00 or 5:00 p.m. After receiving the call, he headed back to his wife's house because "[o]ne of [his] dogs [was] loose and they're into it." He explained, "We went through the gates and the Little Bit dog was off her chain, and her and the older dog were fighting." He used the "break stick" to divide the dogs. He said, "It's a broke hammer handle. I took a knife and whittled it small real quick and broke them up." He then kept the stick in his back pocket "[i]n case they got back together"; however, he testified that he never had to use the stick at the Ewing residence. He identified pictures of the dogs taken at the Humane Society, and he testified that their injuries reflected how they looked after he separated the two dogs.

Mr. Killion stated that Mr. Ewing arrived and helped him load the dogs. He testified that after unloading the dogs at the Ewing residence, he stayed in the basement to clean the dogs. He stated that he first cleaned "Tennessee," the first dog found by law enforcement officers that evening. Mr. Killion stated that he "was cleaning ["Little Bit"] and putting her back in the box," when Mr. Ewing walked through the basement door with Officer Hart, who had a drawn handgun, behind him. He testified that Officer Hart then informed Mr. Ewing that "he was dog fighting and gambling" and asked Mr. Killion to leave the basement.

Alyssa Killion testified that her stepmother made her and her father, Mr. Killion, leave their home and that she stayed with her sister and some of her friends while her father stayed with Mr. Ewing. She stated that she and Mr. Killion were looking at an apartment on May 28, 2007, and her father received a call from his wife. After the call, they "had to turn around and go back" to his wife's house to stop the dogs from fighting. She testified that once they arrived at the house, Mr. Killion opened the fence and broke up the dogs' fight with the "break stick." Alyssa stated that Mr. Killion's wife made no attempt to stop the fight and that the dogs were hurt as a result of their fighting. She estimated that she was at the house about half an hour until Mr. Ewing arrived.

Alyssa testified that she had been with the dogs since they were puppies, and she described the dogs as "big babies" that were not vicious or ferocious. She said, "I walked them every day with my dad, about five miles every day. And we played with them out in the yard. I mean, we'd walk them next to each other and they would follow." She testified that the two dogs would occasionally fight about food or "[if] . . . they're play fighting and one of them bites one too hard or hurts one of them." She continued visiting the dogs at the Humane Society where she volunteered.

Based on the evidence as summarized above, the jury returned verdicts of guilty for both the defendants.

Sentencing Hearing

In a joint March 20, 2008 hearing, the trial court determined that because the State did not file a motion to enhance the defendants' sentencing range, each would be sentenced as standard offender. The court noted that both defendants' records reflected that their criminal history contained convictions "in addition to those necessary to establish the appropriate range."

Mr. Ewing's counsel argued that his 21-year-old conviction of solicitation of murder in Florida should bear little weight because of the age of the conviction and the fact that Mr. Ewing successfully complied with probation. He further argued that his 1995 drug convictions resulted in a successful completion of community corrections and probation. Although the State argued that Mr. Ewing had two prior "animal control violations," Mr. Ewing noted these violations involved neglecting tag and vaccination laws, not animal fighting. Mr. Ewing's counsel also noted that Mr. Ewing had completed high school, had always been employed, and had always provided for his children.

The trial court noted that Mr. Ewing should have been classified as a multiple offender with a sentencing range of two to four years because of his criminal history. The court also found no mitigating factors applicable. The trial court considered incarceration important "to prevent crime and promote respect for the law by providing an effective deterrent"; "to give first priority to incarceration to convicted felons committing offenses with histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation"; "to protect society by restraining a defendant who has a long history of criminal conduct, and [his] history goes back 31 years"; and to avoid depreciating the seriousness of the offense. The court also noted Mr. Ewing's lack of potential for rehabilitation and that he appeared to have arranged the illegal dog fight.

In denying probation, the trial court noted that Mr. Ewing "probably would abide by the terms of probation . . . the way [he] normally [does], [he would] probably get back in trouble after [he] [got] off probation." The trial court also noted that full probation would "unduly deprecate the seriousness of the offense," and it stated, "It's barbaric behavior, watching animals injure each other." The court said, "There's enough violence in our society, and for people to be thrilled at watching animals injure each other . . . it's just not acceptable in our society in the 21st century." The court deemed a two-year sentence appropriate, and it explained, "[T]hat would be less than the minimum that you would have received because you would have received two years at 35 percent minimum had [the State] filed the appropriate documents." The trial court also denied alternative sentencing.

Mr. Killion's counsel argued, "There is no evidence in Mr. Killion's history that would indicate that he's ever had any kind of problem with caring for his animals," and Mr. Killion produced several letters from various people in support of his care of the dogs. Mr. Killion's counsel also noted that Mr. Killion played only a "minor role" in the crime and that he had been steadily employed for 15 years until leaving work to tend to his ailing wife, who ultimately ordered him to leave his house.

The trial court noted that, in addition to a record of driving under the influence and driving on revoked license convictions, Mr. Killion had two 1983 convictions in the Hamblen Criminal Court for selling marijuana and a felony conviction from Asheville, North Carolina, where he received a two-year sentence. The trial court found that no mitigating factors applied and sentenced Mr. Killion to two years' incarceration. The court noted that the same factors applied to Mr. Ewing in denying probation and alternative sentencing also applied to Mr. Killion. It stated, "[Mr. Killion] had a history that went on approximately 18 years," and the court noted he had "a long history of criminal conduct."

Appellate Issues

The defendants appeal the judgments of the trial court on several grounds. First, they attack the trial court's decision to admit the evidence found in Mr. Ewing's basement, which, they argue, resulted from an illegal search. Next, they argue that the convicting evidence was legally insufficient to support the verdicts. Lastly, they argue that their sentences are excessive and that they should have been granted probation or alternative sentencing. We will address each issue in turn.

I. Suppression of Evidence Found in Mr. Ewing's Basement

When reviewing a trial court's findings of fact and conclusions of law on a motion to suppress evidence, we are guided by the standard of review set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* at 23. However, when the trial court does not set forth its findings of fact upon the record of the proceedings, the appellate court must decide where the preponderance of the evidence lies. *Fields v. State*, 40 S.W.3d 450, 457 n.5 (Tenn. 2001); *see Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). As in all cases on appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *See State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). Furthermore, we review the trial court's conclusions of law under a de novo standard without according any presumption of correctness to those conclusions. *See, e.g.*, *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001); *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999).

First, we note that both defendants have standing to litigate the search of Mr. Ewing's basement. As the trial court correctly concluded, Mr. Killion enjoyed a reasonable expectation of privacy in Mr. Ewing's basement as an overnight guest. *See Minnesota v. Olson*, 495 U.S. 91, 99, 110 S. Ct. 1684, 1689 (1990) ("[An overnight guest] seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.").

In the present case, the evidence that the defendants sought to suppress was found during a search of Mr. Ewing's basement, which search emanated from Mr. Ewing's expression of consent to the search; however, the defendants maintain that Mr. Ewing's consent was invalid. They first claim that Officer Hart's illegal entry into the Ewing back yard and his brief seizure of Mr. Ewing vitiated as a matter of law the ensuing consent to search the basement. *See State v. Berrios*,

235 S.W.3d 99, 110 (Tenn. 2007) ("[W]hen consent to search is not sufficiently attenuated from an unlawful seizure, it is presumptively the product of coercion."). Second, they argue that Mr. Ewing's consent was not freely and voluntarily given as a matter of fact. *See id.* at 109 ("Whether an individual voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances.").

The defendants assert that Officer Hart's "initial intrusion" onto Mr. Ewing's back yard violated his Fourth Amendment right against unlawful seizures and, thereby, invalidated the later-given consent to search the basement. The defendants argue that the back yard was not easily viewable from the street and was not a public area. They maintain that the law enforcement officers "simply ignored the privacy rights" of the defendants when they entered the back yard. Further, the defendants contend that, even if probable cause supported a search of the back yard, the officers failed to obtain a warrant to enter the home and curtilage and that the exigent circumstances exception to the warrant requirement did not apply. The State maintains that the initial encounter in the back yard was part of a "knock and talk," which requires no reasonable suspicion or probable cause. The State also posits that the law enforcement officers' entrance into the back yard was permissible under the exigent circumstances warrant exception. As noted in Mr. Killion's brief, the trial court made no explicit findings as to the appropriateness of Officer Hart's entering the back yard; however, the court implicitly found it a legal law enforcement encounter.

Both the state and federal constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Tenn. Const. art. I, § 7 ("That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ."). "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)); *see also State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). Thus, a trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure.

First, we must determine the nature of the law enforcement encounter. Our supreme court has recognized three distinct types of police-citizen interactions: (1) a full scale arrest supported by probable cause; (2) a brief investigatory detention supported by reasonable suspicion; and (3) a brief police-citizen encounter, which requires no objective justification. *State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000). A law enforcement officer does not violate the Fourth Amendment by merely approaching a person in a public place and posing a question. *United States v. Drayton*, 536 U.S. 194, 200, 122 S. Ct. 2105, 2110 (2002). Even if an officer has no basis for suspecting a crime is being committed, he or she may pose questions or ask for identification, provided he or she does not induce cooperation by coercive means. *Id.*, 536 U.S. at 201,122 S.Ct. at 2110; *see Daniel*, 12 S.W.3d at 425. To determine if an interaction between an officer and an

individual is a seizure or a consensual encounter, the court must consider all the surrounding circumstances and ascertain whether the "police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439, 111 S. Ct. 2382, 2389 (1991).

We disagree with the State's characterization of the officers' tactics as a "knock and talk." This court has observed that "[a]lthough our state's courts have not yet addressed the 'knock and talk' procedure, federal courts and courts of other states have recognized it as an accepted investigative tactic" and that various "courts have upheld the 'knock and talk' procedure as a consensual encounter, as well as a means to request consent to search a residence." *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn. Crim. App. 2003) (citing *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001), *cert. denied*, 534 U.S. 861, 122 S. Ct. 142 (2001); *Keenom v. State*, 80 S.W.3d 743, 746 (Ark. 2002); *Latta v. State*, 88 S.W.3d 833, 838 (Ark. 2002); *State v. Smith*, 488 S.E.2d 210, 214 (N.C. 1997)). The State correctly asserts that a "knock and talk" is a consensual police-citizen encounter that does not equate to a seizure and does not implicate Fourth Amendment concerns. *See United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) ("Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home.").

Mr. Killion's brief best addresses the State's argument, "[A 'knock and talk'] appears how this encounter was intended to unfold until Officer Hart unilaterally decided that he needed to go down the side of the Ewing home in plain clothes and draw his weapon as he rounded the corner of the house into the back yard." The trial court found that Officer Hart, unrelated to Officer Collin's speaking with an unidentified woman at Mr. Ewing's front door, proceeded to the back yard and that, upon seeing "Mr. Ewing holding a dog by the collar," he "pulled his handgun and pointed it at the dog and told Mr. Ewing to restrain the dog or he would drop the dog." In our view, Officer Hart's actions exceeded the scope of a "knock and talk"; his brandishing of a firearm certainly dispelled any "consensual" nature of the initial encounter.

Clearly, Officer Hart "seized" Mr. Ewing, if only for a short period of time, and we must address the appropriateness of Officer Hart's entrance into Mr. Ewing's back yard as a first step in examining the validity of Mr. Ewing's consent to search his basement. We must analyze Mr. Ewing's Fourth Amendment rights related to the back yard where he was seized.

The law is settled that the curtilage of a home is entitled to the same constitutional protection against ground entry and seizure as the home. *See State v. Prier*, 725 S.W.2d 667, 671 (Tenn. 1987). The curtilage includes "the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes." *Welch v. State*, 154 Tenn. 60, 64, 289 S.W. 510, 511 (1926). In *Welch*, our supreme court said that the term "houses" used in article I, section 7, of the Tennessee Constitution "would include the 'curtilage.'" *Id*. However, with the emergence of a reasonable expectation of privacy as the keystone for Fourth Amendment analysis, *see Katz v. United States*, 389 U.S. 47, 357 (1967), the presence or absence of a reasonable expectation of privacy now informs in large measure the analysis of the extent of curtilage. For example, the United States Supreme Court has determined that "curtilage questions should be resolved with particular reference to four factors," which are: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure

surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "*the steps taken by the resident to protect the area from observation by people passing by*." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139 (1987) (emphasis added). The Court recognized that, although these factors do not produce a mechanical formula, they "are useful analytical tools" that "bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

The record reveals that Mr. Ewing's yard was not fenced-in and contained a clothesline post and a tree. Officer Collins testified that he could view the "backyard area" from the street; however, the evidence shows that law enforcement officers had to relocate behind the home to observe the people in the back yard. The trial court found that law enforcement officers could view activities in the back yard from "behind those apartments area." Photographs of the Ewing back yard showed it to be open and inclined slightly from the surrounding properties so as to provide unobstructed sight lines from those properties, including the apartment property to the rear. The evidence adduced at the hearing showed that Mr. Ewing was standing between 5 and 18 feet from the basement door when Officer Hart approached. Officers observed several individuals standing in the yard with Mr. Ewing on May 28, 2007.

In light of these circumstances, we cannot say that Officer Hart's entering the back yard of Mr. Ewing's home intruded upon a constitutionally protected area. After a review of the four factors provided in *Dunn*, it is apparent that Mr. Ewing did not enjoy the same expectations of privacy in his unfenced, readily viewable back yard as he did in his home. *See Dunn*, 480 U.S. at 301, 107 S. Ct. at 1139. We acknowledge that Mr. Ewing's close proximity to his home helps his claim under our analysis; however, the remaining factors weigh in favor of the State. No enclosure surrounded the yard nor prevented passerby observation. The trial court explicitly found that the yard was viewable from the parking lot of an apartment complex, and photographs of the back yard show no indicia that Mr. Ewing desired to shield the public from observing his back yard. The evidence showed that a group of people were assembled in the unenclosed back yard. Upon review of these circumstances, the activities in the back yard lay outside the ambit of constitutional protection.

Because the initial encounter between Officer Hart and Mr. Ewing did not occur in the curtilage of Mr. Ewing's home, the encounter required no warrant or warrant exception. As a brief investigative detention, Officer Hart acted reasonably in securing himself and others by assuring the pit bulldog was restrained, especially in light of his suspicions of dog fighting. The trial court found that, after Mr. Ewing secured the pit bulldog, Officer Hart holstered his weapon and that the consent given thereafter was voluntary. We will not disturb these factual findings and conclude that the initial entry and encounter in the back yard did not per se invalidate Mr. Ewing's subsequent expression of consent to search.

We next inquire into the factual voluntariness of the consent to search. The defendants argue as "[t]he most significant issue" regarding the voluntariness of Mr. Ewing's consent to search the basement "that just minutes after Officer Hart had him or his dog at gunpoint that he was asked to open the basement door." To pass "constitutional muster," consent to search

must be "'unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.'" *State v. Cox*, 171 S.W.3d 174, 184 (Tenn. 2005) (quoting *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998)). As we have already stated, "[w]hether an individual voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances." *Berrios*, 235 S.W.3d at 109. Because voluntariness of consent is a question of fact, the trial court's finding of voluntariness will be upheld unless the evidence preponderates otherwise. *Odom*, 928 S.W.2d at 23. The trial court specifically found that Mr. Ewing's consent was voluntary and that he was under no duress when he gave consent to search his basement. The trial court clearly credited Officer Hart's and Officer Collins' testimony above Mr. Ewing's testimony in finding Mr. Ewing's consent "unequivocal, specific, and intelligently given," and the court noted that Mr. Ewing himself opened the basement door. Although the display of a firearm must be considered as a factor in determining the voluntariness of consent, *see State v. Scarborough*, 201 S.W.3d 607, 623 (Tenn. 2006), the trial court found that, at the time consent was given, Officer Hart no longer displayed the gun and caused no duress for Mr. Ewing. We will not go behind the trial court's findings of fact regarding Mr. Ewing's voluntary consent.

We hold that the initial police encounter and subsequent consent to search pass constitutional muster, and we will not disturb the trial court's denial of the defendants' motions to suppress.

II. Sufficiency of the Evidence

The defendants next challenge the sufficiency of the convicting evidence, relying mostly on the circumstantial nature of the evidence and the contrary defense evidence provided at trial. A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

Moreover, a criminal offense may be established exclusively by circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237 (Tenn. 1973); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003); however, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). "In other words, '[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.'" *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987) (quoting *Crawford*, 470 S.W.2d at 613).

Tennessee Code Annotated section 39-14-203 reads, "It is unlawful for any person to . . . cause for amusement, sport or gain, any [dog] to fight, bait or injure another animal." T.C.A. § 39-14-203(a)(2) (2006). Further, it is an offense to permit such fighting "to be done on any premises under the person's charge or control, or aid or abet those acts." *Id.* § 39-14-203(a)(3). The evidence, viewed in a light most favorable to the State, supports the defendants' convictions. The evidence showed that Mr. Ewing owned the home and basement where the evidence of dog fighting was found and that Mr. Killion was staying in the basement. The basement contained a partitioned area with dirt flooring where the walls appeared to have blood spatter. Law enforcement officers found a "break stick" and a sprayer, both commonly used in dog fighting, in the basement. Further, a digital clock with time-keeping capabilities was found on a window ledge. The only window to the basement had been "blacked out" with paint. Most damaging to the defendants was the discovery of two pit bulldogs in the basement. Both dogs had significant injuries. Although Doctor Parks explained the injuries were not life-threatening, he opined that the injuries were "puncture wounds" caused by fighting. The dogs were bleeding when discovered by law enforcement officers, indicating that the injuries were fresh.

The jury was well within its province in finding the defendants guilty of dog fighting based on the above-mentioned evidence and in finding the defendants' explanations of the conviction evidence unreasonable. Although the defendants presented alternative explanations of the injured dogs and "pit" area of the basement, the jury clearly chose not to credit this testimony. We will not disturb the jury's verdict.

III. Sentencing

The defendants both argue that a two-year sentence--the maximum for a standard offender convicted of a Class E felony--was excessive and that the trial court erred by denying probation or alterative sentencing. Mr. Killion argues, without citation to legal authority, that the trial court acted improperly by using "the absence of an enhancement notice by the [S]tate as an enhancement." When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo.

Id. If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

As the recipients of Class E felony convictions, the defendants are considered favorable candidates for alternative sentencing. T.C.A. § 40-35-102(6) (2006). "[F]avorable status consideration," however, does not equate to a presumption of such status. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Rather, sentencing issues are determined by the facts and circumstances presented in each case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). As the recipient of sentences of ten years or less, the defendants are also eligible for probation. *See* T.C.A. § 40-35-303(a). The defendants bore the burden of showing that they were entitled to probation. *See, e.g.*, *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999) (holding that defendant bears the burden of establishing his "suitability for full probation").

To determine the appropriate combination of sentencing alternatives that shall be imposed on the defendants, the court shall consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative." *Id.* § 40-35-103(5).

In sentencing both defendants, the trial court considered enhancing and mitigating factors and properly considered the defendants' respective criminal histories as enhancement factors in sentencing the defendants to the maximum allowable length. *See id.* § 40-35-114(1) (allowing sentence enhancement on the basis that "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"). Here, the record establishes that each defendant possessed criminal convictions in excess of the number required for a Range I sentence. Further, in denying probation and alternative sentencing, the trial court properly considered each defendant's repeated criminal activity as well as the need to prevent depreciating the seriousness of the offense. *See id.* § 40-35-103(1)(A), (B). The trial court

also acted within its discretion in considering the "barbaric" nature of the defendants' crimes as reason for denying alternative sentencing. *See, e.g.*, *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001). Accordingly, we do not disturb the defendants' sentences.

IV. Mr. Killion's Individual Issues

Mr. Killion raises two issues on appeal that were not pursued by Mr. Ewing. First, he argues on appeal that the trial court erred by finding that the 9-1-1 call regarded a reported dog fight at the conclusion of the suppression hearing. He argues that the court ruled that Officer Collins "could not testify as to the nature of the notification of a dog fight from 911" and that, therefore, the court erred by relying upon that inadmissible information in finding that law enforcement personnel's presence in the Ewing back yard was proper. Upon our review of the record, no objection was contemporaneously raised regarding the following statement by Officer Collins: "[The female at the front door] asked what we were doing and I explained to her that I had a call about a dog fight going on." *See, e.g.*, Tenn. R. App. P. 36(a); *see State v. Killebrew*, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (holding that the failure to lodge a contemporaneous objection results in waiver on appeal). In light of this, the trial court acted within its discretion in finding that the 9-1-1 call reported dog fighting. Additionally, the record repeatedly refers to an anonymous tip reported to the Humane Society from which the trial court could infer that the call involved dog fighting.

In Mr. Killion's second issue, he alleges that the "cumulative effect of the State's characterizations of evidence, the testimony of the officers as expert witnesses and the court's rulings was prejudicial." In reviewing his argument, we note that his brief makes no citation to any legal authority in support of this vague claim of error. Pursuant to Court of Criminal Appeals Rule 10(b), we will not consider this issue. Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by . . . citation to authorities . . . will be treated as waived in this court.").

Conclusion

In light of the foregoing analysis, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE